U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Vermont Service Center Date: FEB 14 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under § 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e)

IN BEHALF OF APPLICANT: [redacted]

Public Copy
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

For Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, and the matter will be remanded to the director to request a § 212(e) waiver recommendation from the United States Information Agency (USIA).

The applicant is a native and citizen of Romania who is subject to the two-year foreign residence requirement of § 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because she participated in graduate medical education and training and because the Director, (USIA), has designated Romania as clearly requiring the services of persons with the applicant's specialized knowledge or skill. The applicant was admitted to the United States as a nonimmigrant exchange visitor in 1994. The applicant married a United States citizen on July 22, 1999. The applicant seeks the above waiver after alleging that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse.

The director determined that the record failed to establish that the applicant's departure from the United States would impose exceptional hardship upon her spouse and denied the application accordingly.

On appeal, counsel states that the decision did not recognize the grave and serious nature of the circumstances presented, recognize the severe consequences of the decision and address all of the hardship factors.

On appeal, counsel states that Romania has a surplus of physicians. Counsel's statement only contradicts the finding by the Director, USIA, that places all categories of physicians on the Skills List for Romania due to shortages in that field.

On appeal, counsel asserts that the applicant's spouse is a psychologically disabled individual with a long and tragic history of clinical depression that has prevented him from leading a normal life and he is clearly dependent on the applicant for financial and emotional support.

Section 212(e) EDUCATIONAL VISITOR STATUS: FOREIGN RESIDENCE REQUIREMENT; WAIVER.-No person admitted under § 101(a)(15)(J) of the Act or acquiring such status after admission-

> (i) whose participation in a program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his residence,
>
> (ii) who at the time of admission or acquisition of status under § 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of

persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training,

shall be eligible to apply for an immigrant visa or for permanent residence, or for a nonimmigrant visa under §§ 101(a)(15)(H) or 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of § 214(k): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by § 212(e) of the Act.

Counsel states that the present case is closely analogous to decision in Mansour, where the district director found exceptional hardship because the U.S. citizen spouse would experience "undue"

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psychological anguish "if deprived of the companionship of her husband."

On appeal, counsel asserts that the applicant's husband's disabling condition has prevented him from coping and adjusting to the demands of life in a normal manner. Counsel states that Dr. [redacted] earned a Ph.D degree in English in 1982 with a specialty in Japanese Haiku poetry. Counsel states that Dr. [redacted] is a middle aged man (approximately 55 years of age) whose disabling condition has limited him to only one year of full-time employment in his entire adult life. Counsel indicates that in recent years the highest annual earnings by Dr. [redacted] have totaled less than $6,000.

The record reflects that Dr. [redacted] obtained a teaching job in China following his graduation in 1982 but failed to fulfill the one-year contract. He returned to the United States to live with his mother. After tension developed with his mother, Dr. [redacted] entered therapy for six months. The record indicates that Dr. [redacted] then moved to Texas, obtained and lost employment, married in 1989 and quickly divorced, obtained welfare benefits, and sought a three-year period of outpatient treatment in 1989. Dr. [redacted] then met his present wife and followed her to Vermont where he obtained part-time employment.

Dr. [redacted] is financially dependent on the applicant. The psychological evaluation indicates that Dr. [redacted] has been financially independent for a total period of two years during his life (55 years), he has accumulated three years of unemployment compensation and three years of public assistance. The report suggests that Dr. [redacted] has improved during his five-year relationship with the applicant and there is no reason to expect that he can suddenly function on his own in this country without the emotional and financial support of his wife.

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

The record contains specific documentation which reflects that the applicant's husband has certain psychological problems, past, present and potential, which go beyond the normal. The record also reflects that the applicant's has been unsuccessful in adjusting to foreign cultures in the past and could not accompany his wife to Romania. The record further establishes that the applicant's spouse is completely dependent on her for financial and emotional assistance. It is concluded that the record now contains evidence of hardships which, in their totality, rise to the level of exceptional as envisioned by Congress.

[redacted]

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957), and Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has been met, and the appeal will be sustained.

It must be noted that a waiver under § 212(e) of the Act may not be approved without the favorable recommendation of the USIA. Accordingly, this matter will be remanded to the acting district director to file a Request For USIA Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this case (Form I-612). If the USIA recommends that the application be approved, the application must be approved. On the other hand, if the USIA recommends that the application not be approved, then the application must be re-denied without appeal.

ORDER: The appeal is sustained. The director's decision is withdrawn. The record of proceeding is remanded to the director for action consistent with the foregoing.